IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 187

REALTY OPERATORS, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

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Statement

This brief is filed on behalf of The South Coast Corporation for whom the undersigned is counsel in support of the petition of Realty Operators, Inc. for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit.

The South Coast Corporation, like Realty Operators, Inc., paid processing taxes under the Agricultural Adjustment Act and filed a petition to recover these taxes. The proceeding instituted by The South Coast Corporation is still pending before The Tax Court of the United States at

the time of the filing of this brief. It involves, among other issues, the interpretation of Section 907 (a), (b) and (e) of the Revenue Act of 1936,* average margins and the general price rise in the sugar industry, all in question here.

This proceeding brings to this Court for review, for the third time from the Fifth Circuit, a question which this Court has decided clearly and unequivocally.

The decision below is based on the assumption that margins were favorable to that claimant (R. 41, 129). The statement in Respondent's brief in opposition (p. 14) that margins were higher during the tax period is not supported by the record.

Summary of Argument

The decision in *Realty Operators, Inc.* v. *Commissioner* is erroneous in failing to attribute any evidentiary weight to margins favorable to the claimant and in conflict with the decision of this Court in *Webre Steib Co. Ltd.* v. *Commissioner,* 324 U. S. 164 and the decisions of other courts.

ARGUMENT

I

The decision below rests on the same unsound theory to which the Circuit Court of Appeals for the Fifth Circuit has constantly adhered in its previous decisions.

The Court below has consistently refused to give any evidentary effect to statutory margins favorable to a claimant.

* 7 U. S. C. 644, printed in the appendix to Respondent's brief.

In *Commissioner of Internal Revenue* v. *Bain Peanut Company of Texas*, 134 F. (2d) 857, it reversed a decision of the Processing Tax Board of Review allowing recovery on the basis of favorable margins, saying:

> "A claimant under the statute may make out his case, if his margin is shown to be lower during the tax period, by invoking the presumption, but in all cases where the prima facie proof is so established, the Commissioner may rebut the presumption by proof that the burden of the tax was shifted, which proof may include evidence that sales prices of the produce were increased by the approximate amount of the tax imposed, and that the amount of the tax was billed separately. The uncontradicted evidence adduced by the Commissioner showed that this taxpayer actually did shift the burden of the tax; the *presumption was rebutted; it was completely dissolved; and the burden reverted to the claimant to come forward with evidence or suffer judgment to be entered against it.* The decision of the Board being favorable to it, (the claimant), on the basis of the presumption alone, respondent had no reason to present proof of the actual extent to which it bore the burden of the tax." (Italics supplied.)

On petition for certiorari by Bain Peanut Company, a writ was granted by this Court (320 U. S. 721). However, by paying the entire amount of its claim, exclusive of interest, and thereby persuading the Petitioner to dismiss the proceeding, the Government avoided a decision of this question by this Court.

On February 15, 1944, the same Circuit Court of Appeals decided *Webre Steib Co. Ltd.* v. *Commissioner*, 140 F. (2d) 768 (later reviewed and modified by this Court), after this Court had granted certiorari in the *Bain Peanut Company* case, *supra*. In this decision that Court reaffirmed its theories as to comparative margins:

> "It thus appears that, conceding the validity of the marginal computation to support the inference

drawn by the Board, the claimant's evidence at its best made out a prima facie case for a refund of $3,655.82. The remaining question is whether, as contended by the Commissioner, the facts adduced upon the hearing and found true by the Board rebutted the presumption upon which the refund depended. We adhere to our ruling in the Bain Peanut Company case that the statutory presumption, when rebutted, disappears entirely from the case; and *if there is no proof aliunde the presumption, the taxpayer, upon whom the burden of proof lies, must suffer an adverse decision.*

"* * * Upon evidence before it the Board found that the claimant had participated in a universal increase in the selling price of sugar, effective as of the moment the processing tax was imposed, to cover the amount of the tax; and that claimant had collected from its vendees all taxes, for the entire period of the tax, assessed upon the processing of molasses, and all taxes for processing sugar during the year 1935. These findings are not attacked. Moreover, there was no showing that this policy of shifting the burden of the tax, thus shown to exist at the beginning and end of the tax period, did not continue throughout the effective period of the taxing statute. *This evidence clearly was sufficient to dissolve the presumption, and since there was no other proof to support any refund, the claim should have been disallowed in its entirety.*" (Italics supplied.)

THE DECISION OF THE COURT BELOW IS INDISTINGUISHABLE FROM THESE PRIOR HOLDINGS AND PRONOUNCEMENTS.

The following quotation from its opinion in *Realty Operators, Inc.* v. *Commissioner* makes this clear (R. 129):

"Conceding, as did the Tax Court, that the presumption here was in favor of the claimant, we think the proof introduced by the Commissioner was sufficient to support a finding that the entire tax was shifted. Evidence that petitioner increased its selling price of sugar in the amount of the tax on the

> very day that the tax went into effect, and never reduced it during the tax period, was *exactly (fol. 131) the kind of evidence mentioned in the statute as sufficient to rebut the presumption in favor of the taxpayer.* Therefore, upon the authority of *Webre Steib* v. *Commissioner,* 324 U. S. 164, the decision of the Tax Court is affirmed." (Italics supplied.)

The decision of the Tax Court which the Circuit Court of Appeals affirmed contains no attempt to weigh the evidence. The Tax Court did not even determine statutory margins from the evidence and obviously, therefore, could not weigh them as evidence against Respondent's proof. It merely assumed the margins to be favorable to Petitioner and concluded they should be disregarded when the *prima facie* presumption was rebutted (R. 41). **This is the same interpretation of Section 907 as that adopted by the Court below in the Bain Peanut Company case and the Webre Steib Co. Ltd. case.**

II

This theory of the Circuit Court of Appeals for the Fifth Circuit has been specifically rejected by this Court in *Webre Steib Co. Ltd.* v. *Commissioner,* 324 U. S. 164, but that Court has failed to recognize it.

When the *Webre Steib Co. Ltd.* case was brought to this Court by the granting of claimant's petition for certiorari, the exact questions in issue in this proceeding were presented and decided contrary to the contentions of the Government and the conclusions of the Court below. This appears clearly from the following quotations from this Court's opinion (pp. 172, 173-174):

> "The court below, although it remanded the cause, apparently meant for it to be dismissed, for it said 'since there was no other proof to support any refund, the claim should have been disallowed in its entirety.' *Literally, of course, this cannot be true,*

for the margin evidence remained in the case for whatever it might be worth apart from the presumption. * * * The case must go back to the Tax Court for decision on the evidence rather than on the presumption. * * *

"* * * Congress apparently believed that the rational connection was strong enough to justify basing a finding of absorption on the margin evidence alone. For, as we have seen, Congress intended that in a case where margins were favorable to the claimant and no other evidence was introduced the claimant should be entitled to a refund and there appears no reason of convenience or policy which would lead to such a rule in the absence of rational connection. For all these reasons we think a finding of absorption which was based solely on the margin comparisons would not be irrational.

"Nor is the Commissioner's evidence so conclusive as to deprive the margin evidence of all significance. * * * *there is no evidence to show how far petitioner succeeded in its effort to pass the tax on, except for the evidence that there was a general rise in the market* on a date some months before petitioner's processing began. *The margins are some evidence that the price may not have responded continuously to the effort to shift the tax."* (Italics supplied.)

The decision of the Tax Court in this proceeding was promulgated before the decision of this Court in the *Webre Steib Co. Ltd.* case. The *Court below,* however, in reviewing the Tax Court's decision after the handing down of this Court's opinion in the *Webre Steib Co. Ltd.* case, makes no attempt to follow the theory and construction of Section 907 announced by this Court in that decision, although it gives lip service to the decision by citing it. It ignores the statement of this Court quoted that even after a general price rise margins might be some evidence that "the price may not have responded continuously to the effort to shift the tax." With a state of facts before it obviously identical to that presented in the *Webre Steib Co.*

Ltd. case, the Circuit Court of Appeals did not remand the case to the Tax Court to consider the evidence as to margins, as this Court directed in the *Webre Steib Co. Ltd.* case. Instead it affirmed saying (R. 129):

> "Conceding, *as did the Tax Court,* that the presumption here was in favor of the claimant, we think the proof introduced by the Commissioner was sufficient to support a finding that the entire tax was shifted."

This decision is so completely in conflict with the decision of this Court in *Webre Steib Co. Ltd.* v. *Commissioner, supra,* that it cannot fail to cause great confusion and uncertainty in law.

III

Only in the Fifth Circuit has this theory been followed.

Elsewhere, both before and after the decision of this Court in *Webre Steib Co. Ltd.* v. *Commissioner, supra,* the evidentiary value of margins has been recognized and weighed in determining the preponderance of the evidence.

In *Helvering* v. *Insular Sugar Refining Corporation* (decided Mar. 27, 1944), 141 F. (2d) 713, the Court of Appeals for the District of Columbia, following the granting of certiorari by this Court in *Bain Peanut Co. of Texas* v. *Commissioner, supra,* handed down a decision in which the claimant's favorable statutory margins were held to be a sufficient evidentiary basis to sustain the recovery allowed by the Processing Tax Board of Review. The Government in that case introduced much evidence claimed to rebut these favorable margins, including proof that at the time the processing tax took effect in the United States, June 8, 1934, there was a general price rise. This it was contended was sufficient to rebut the presumption. The Court of Ap-

peals for the District of Columbia, however, refused to so hold saying:

> "These various factors the Board considered in weighing the rebuttal evidence of the Commissioner. Nor does it by any means follow that the Commissioner's assumption, which we have said may be indulged, that the June 1934 advance in the market was attributable solely to the tax, is true. For, by the same process of reasoning, it would follow that when the tax was withdrawn, the market would decline. And this, as the record shows, it not only did not do, but instead, it actually advanced. In this aspect, it would be just as reasonable to ascribe the advance to the limitation of the supply *under the quota system which the Act imposed* * * *."
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> * * * * * * *
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> "Clearly, this language (referring to the opinion of the Board) must be accepted as reflecting the Board's consideration and weighing of the Commissioner's and claimant's evidence, and of the application thereto of its expert knowledge; so that we have a case on which the Government illegally collected from claimant over $500,000, which in law and conscience it was obligated to repay to it, or to whoever had borne the burden of the payment. To determine the question, Congress adopted a formula, the application of which in doubtful cases it considered was sufficient to identify the loser and fix the amount of his recovery—unless the Commissioner should go forward and by satisfactory evidence show that his loss has been recouped. *This the Commissioner has done only to the extent of showing a rise in the market price of the taxed product, equal to the tax, on or about the tax month in the United States;* and on this showing he rests. This the Board considered and, applying its special knowledge and experience held insufficient on the weight of the evidence." (Italics supplied.)

The Tax Court itself has correctly interpreted and followed the decision and opinion of this Court in *Webre Steib Co. Ltd. supra,* in an unjust enrichment tax case, *The South Coast Corporation* v. *Commissioner,* Docket No. 2165 (un-

published) Prentice Hall Par. 45213 (now pending before the Circuit Court of Appeals for the Fifth Circuit on a petition for review filed by the Government).

The opinion and decision of the Tax Court in that case are to be contrasted in this regard with the conclusions of the Circuit Court of Appeals for the Fifth Circuit in the decision below. The Tax Court said in *The South Coast Corporation* case:

> "* * * Against this evidence of respondent is the favorable 'margin' comparison of petitioner, which must be considered regardless of whether the presumption favoring petitioner based on those margins has been eliminated. *Webre Steib Co. Ltd.* v. *Commissioner*, —— U. S. —— (Feb. 12, 1945)."

The Court allowed the claim of The South Coast Corporation on the basis of petitioner's margins in the face of proof of a general industry wide increase in the price of sugar at the time the tax took effect. In conformity to the views expressed by this Court in *Webre Steib, supra,* the Tax Court did not treat the general increase in the price of sugar as a controlling factor, commenting that:

> "It must be remembered that fluctuations in price of refined sugar are due to many causes other than tax imposition."

It merely considered the price increase in conjunction with all the other evidence in the case, including the margins, in making a careful "weighing of the evidence," as enjoined by this Court in *Webre Steib, supra,* concluding:

> "Therefore assuming that the respondent's proof that petitioner's predecessor at the time of the original imposition of the processing tax increased its price in an amount sufficient to cover the tax, together with the proof that petitioner kept a book account recording the processing tax, is sufficient to dissolve the statutory presumption in petitioner's

> favor, thus shifting the burden back to petitioner, *on the entire record we think petitioner has established that during its taxable period it absorbed the contested processing tax on refined sugar sales.*" (Italics supplied.)

The citation of other decisions would serve no useful purpose and would unduly prolong this brief.

IV

There is even less warrant in the record for the decision of the Tax Court below than was shown to exist in *Webre Steib Co. Ltd. v. Commissioner*, *supra*, and *Dobson v. Commissioner*, 320 U. S. 489, therefore is not applicable.

In the *Webre Steib Co. Ltd.* case as pointed out above, the question at issue was the same as that presented in this proceeding. There this Court stated that question as follows (p. 168):

> "Our first question is whether the Board was entitled to base an award upon the statutory 'prima facie evidence' or 'presumption,' or whether the Government's evidence removed the presumption from the case as a matter of law. For, although the Board did not state how it arrived at its award, it seems likely it relied upon the *prima facie evidence provisions* and not upon a weighing of the evidence; * * *." (Italics supplied.)

Moreover, in *Realty Operators, Inc.* v. *Commissioner* the Tax Court did not even make findings as to the "statutory *prima facie* evidence," *i. e.*, the correct margins. Instead, it *assumed the existence of the favorable margins* and then, following the theory of the Courts below in its prior decisions, **held that the margins disappeared with the statutory presumption.** Since a decision on the preponderance of the

evidence could not have been based on assumptions, it is even clearer in this proceeding than it was in the *Webre Steib* case that the Tax Court "*relied upon the prima facie evidence provisions and not upon a weighing of the evidence.*"

In this proceeding, therefore, this Court will have presented to it, if it grants a writ of certiorari, not the question of fact which it refused to pass on in *Webre Steib Co. Ltd.* v. *Commissioner*, since ever appropriate findings as to statutory margins are lacking and there is no basis for a decision as to the preponderance of the evidence.

Instead, it will have before it for review the same question of law which it decided contrary to the conclusion of the Court below in the *Webre Steib Co. Ltd.* case.

CONCLUSION

The Circuit Court of Appeals for the Fifth Circuit has decided an important question of federal law in a way probably in conflict with the applicable decisions of this Court and in conflict with a decision of the Court of Appeals for the District of Columbia on the same matter. This decision, unless corrected, is bound to result in further conflicts, substantial injustice to taxpayers and administrative confusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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